No. 92-1639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE CITY OF CHICAGO, *et al.*,
Petitioners,
v.
ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes," exempts from hazardous waste regulation the ash generated by burning municipal solid waste at such a facility.

PARTIES TO THE PROCEEDING

The petitioners are the City of Chicago and Richard M. Daley, in his official capacity as Mayor of the City of Chicago. The respondents are the Environmental Defense Fund, Inc., and Citizens for a Better Environment.

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OPINIONS BELOW

The opinion of the court of appeals upon remand from this Court, Pet. App. 1a-4a, is reported at 985 F.2d 303 (7th Cir. 1993). The initial opinion of the court of appeals, Pet. App. 5a-21a, is reported at 948 F.2d 345 (7th Cir. 1991), vacated and remanded, 113 S. Ct. 486 (1992). The district court's memorandum opinion and order, Pet. App. 22a-33a, is reported at 727 F. Supp. 419 (N.D. Ill. 1989).

JURISDICTION

The judgment of the court of appeals upon remand from this Court was originally entered by an unpublished order issued on January 12, 1993. The court of appeals

issued a published decision on January 29, 1993. The petition for a writ of certiorari was filed on April 12, 1993. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 6921(i)

(i) Clarification of household waste exclusion

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

STATEMENT

1. *Background.* This country faces a solid waste disposal crisis of national proportions. See 42 U.S.C. § 6901(a), (b). In 1988, we generated approximately 180 million tons of municipal solid waste—the "residential and commercial solid wastes generated within a community" (40 C.F.R. § 241.101(k) (1991)); that number is projected to grow to 216 million tons by the year 2000. See 56 Fed. Reg. 50978, 50980 (1991) (summarizing the findings of an Environmental Protection Agency study). Much of that waste is now deposited in landfills.

In 1976, when Congress first enacted the Resource Conservation and Recovery Act (RCRA), it warned that "alternatives to existing methods of land disposal must be developed since many of the cities of the United States" are running out of waste disposal sites. 42 U.S.C. § 6901(b)(8). More recently, when it enacted the Solid Waste Disposal Act Amendments of 1980, Congress identified one such alternative: "the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste." *Id.* § 6941a(3). See also *id* § 6941a(2) ("solid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials"). Facilities that extract reusable materials from municipal solid waste or convert solid waste into energy are classified as "resource recovery" facilities under RCRA, 42 U.S.C. § 6903(24).

The general federal statutes and regulations governing waste disposal are an important part of the regulatory matrix applicable to the operation of resource recovery facilities. When Congress enacted RCRA, it directed that "hazardous waste" be managed pursuant to an elaborate regulatory scheme—set forth in Subtitle C of the statute—

that establishes standards for the treatment, storage, and disposal of such waste. See 42 U.S.C. §§ 6921-6939.[1] Generators of hazardous waste must obtain an identification number from the United States Environmental Protection Agency (EPA) before engaging in the treatment, storage, transportation, or disposal of hazardous wastes. See 40 C.F.R. § 262.12 (1991). Hazardous waste must be packaged, labelled, and marked according to specific regulations before it may be shipped. See *id.* § 262.30-262.33. It may be held only in approved containers and only for specified periods of time. See *id.* § 262.34. Facilities that treat, store, or dispose of hazardous waste must obtain permits (see 42 U.S.C. § 6925), and must comply with many regulations setting performance standards for such facilities. See *id.* § 6924; 40 C.F.R. § 264.1-264.1065 (1991).

Disposal of non-hazardous waste is regulated under Subtitle D of RCRA, which provides less stringent regulation than Subtitle C. See 42 U.S.C. §§ 6941-6949. The EPA has promulgated regulations setting minimum national standards for landfills that accept non-hazardous waste. See 56 Fed. Reg. 50978 (1991).

Waste from homes and offices sometimes contains some components that qualify as hazardous waste under the federal scheme, but Congress made clear in the legislative history of RCRA that it did not intend to regulate such "general municipal wastes" as hazardous waste. S.

[1] The statute defines "hazardous waste" as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infection characteristics may—

> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health when improperly treated, stored, transported, or disposed of, or otherwise managed."

42 U.S.C. § 6903(5).

Rep. No. 988, 94th Cong., 2d Sess. 16 (1976). The EPA subsequently promulgated a regulation—the "household waste exclusion"—providing that "any material * * * derived from households (including single and multiple residences, hotels and motels * * *)" is not a hazardous waste within the meaning of the statute. 45 Fed. Reg. 33120 (1980) (subsequently codified as amended at 40 C.F.R. § 261.4(b)(1) (1991)). This exclusion permits the disposal of all household waste in a Subtitle D landfill, even if some small portion of the waste would otherwise qualify as hazardous waste under the generally applicable statutory standard, perhaps because it contains, for example, such household items as a can of pesticide, paint thinner, or nail polish remover. At the time the EPA issued this regulation, it stated that the exclusion extended to ash remaining after household waste was burned in an incinerator. "Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33098 (1980).

In 1984, Congress added a new provision to RCRA—Section 3001(i)—entitled "Clarification of household waste exclusion." It states in pertinent part that "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste for the purposes of regulation under this subchapter" if the facility receives and burns only (a) household waste and (b) commercial and industrial solid waste that does not contain hazardous waste. 42 U.S.C. § 6921(i).[2]

[2] In addition, the facility may not accept hazardous waste, and the owner or operator of the facility must "establish[] contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility." 42 U.S.C. § 6921(i)(2).

The Senate Committee Report accompanying this provision observed that resource recovery facilities often take in household waste mixed with non-hazardous waste from other sources, such as schools, churches, and municipal buildings. The committee stated that

> [i]t is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New section [3001(i)] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983).

The question in this case is whether, under Section 3001(i), the ash residue remaining after solid waste is burned in a resource recovery facility may be disposed of in a Subtitle D disposal facility, regardless of whether the ash might otherwise qualify as a hazardous waste under the generally applicable standard.

2. *The Chicago Resource Recovery Facility*. The City of Chicago owns and operates a resource recovery facility, the Northwest Waste-to-Energy Facility ("Northwest Facility"), where it burns municipal solid waste and generates electricity, thereby reducing the volume of waste disposed of in landfills and helping to reduce dependence on imported oil for the generation of electricity. The facility processes approximately 14% of the municipal solid waste produced in Chicago. R. 18. Every 10,000 cubic yards of refuse is reduced to 1,000 cubic yards of residue. *Ibid.* The facility also produces steam by recovering the energy generated from the combustion of the waste. The facility not only uses the steam for its own operations, but also sells it for $1 million to nearby industry and for another $500,000 to the local utility. *Ibid.* Finally, the facility recovers approximately 55 tons

of tin cans and other ferrous metals each day, which are sold to scrap metal dealers. *Ibid.*

At the time that this case was before the district court, the City disposed of the ash remaining at a sanitary landfill located in Three Oaks, Michigan, that received only municipal incinerator ash. R. 18. This is a lined landfill with a leachate collection system and groundwater systems to monitor its performance. *Ibid.*[3] The City does not test the ash produced at the Northwest Facility to determine whether it would be classified as hazardous under EPA regulations, and has not managed the ash as a hazardous waste.

3. *The Proceedings Below*. The Environmental Defense Fund and Citizens for a Better Environment (hereinafter collectively referred to as EDF) filed the complaint in this case, alleging that the City violated several provisions of RCRA, 42 U.S.C. §§ 6901-6992(k), by not handling the ash produced at the Northwest Facility as a hazardous waste pursuant to Subtitle C of RCRA. R. 1.[4] EDF simultaneously filed a similar action in the Southern District of New York against Wheelabrator Technologies, Inc., and Westchester Resco Co., which own and operate a resource recovery facility in Peekskill, New York. See *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758 (S.D.N.Y. 1989), aff'd, 931 F.2d 211 (2d Cir.), cert. denied, 112 S. Ct. 453 (1991).

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[3] The ash is now disposed of at a lined landfill that receives only municipal incinerator ash that is located near Joliet, Illinois.

[4] EDF alleged that it has members who live near the Northwest Facility and the Three Oaks Landfill whose health, economic, aesthetic, and environmental interests have been or may be affected by the City's allegedly illegal conduct. R. 1 at paras. 4-5. Section 7002 of RCRA authorizes a private right of action against persons or governmental entities alleged to have violated the statute. See 42 U.S.C. § 6972.

In this case, the parties filed cross motions for summary judgment R. 18, 30. The City's position was that Section 3001(i) exempted the process of incinerating waste and producing ash at a resource recovery facility from regulation as hazardous waste. In addition to filing its own motion for summary judgment, EDF opposed the City's motion on the ground that the City had not yet demonstrated that the City's facility met the requirements of Section 3001(i).

The district court concluded that Section 3001(i) of RCRA exempted the ash produced at resource recovery facilities from regulation as a hazardous waste. Pet. App. 22a. The court held that when Congress amended RCRA to exempt resource recovery facilities from hazardous waste regulations, it intended to exclude all waste management activities at these facilities from regulation. *Id.* at 28a. The district court found that this conclusion was consistent with RCRA's policy goal of encouraging resource recovery facilities and removing impediments that may hinder their development and operation. *Ibid.* The district court, however, denied both motions for summary judgment, and allowed EDF additional discovery to determine whether the Chicago facility followed the procedures required under Section 3001(i) for excluding the intake of hazardous wastes at the Northwest Facility. *Id.* at 33a. After extensive discovery, EDF stipulated that it would not contest the adequacy of the Northwest Facility's procedures for excluding hazardous wastes and would not oppose a renewed motion for summary judgment by the City. R. 91. The district court subsequently granted the City's renewed motion for summary judgment. Pet. App. 34a.

A divided court of appeals reversed. The majority held that the ash generated by a municipal solid waste incinerator must be disposed of in accordance with the provisions of Subtitle C of RCRA. Pet. App. 18a, 20a. The majority concluded that the Section 3001(i) exception from hazardous waste regulations when a resource recovery facility is "treating, storing, disposing of, or otherwise managing" waste, does not explicitly exempt the ash "generated" by such facilities. *Id.* at 18a-19a. The majority acknowledged that the only other appellate court to address this issue, the Second Circuit in the *Wheelabrator* case, had reached the opposite conclusion. *Id.* at 8a.[5] Judge Ripple dissented, stating that he would affirm for the reasons stated in the Second Circuit and Southern District of New York opinions. Pet. App. 21a.

The City filed a petition for a writ of certiorari. EDF acknowledged the square conflict with the decision in *Wheelabrator* and agreed that the case presented an important question of federal law. Brief for Respondent, No. 91-1328, at 8 (on petition). EDF urged the court to grant certiorari. *Id.* at 8, 12, 17. The Court then invited the views of the Solicitor General.

On September 18, 1992, while the Court was awaiting the views of the Solicitor General, the Administrator of the EPA issued a memorandum setting forth EPA's determination that Section 3001(i) of RCRA exempted from hazardous waste regulation under Subtitle C the ash generated by the combustion of municipal solid waste at resource recovery facilities. Pet. App. 41a. Shortly thereafter, the Solicitor General responded to the Court's invitation by writing that, in his view, the courts should defer to EPA's interpretation of Section 3001(i), and suggesting that the petition be granted, the decision vacated, and the case remanded to the Seventh Circuit for further consideration in light of the Administrator's memorandum. Brief for the United States as Amicus Curiae, No. 91-1328, at 7, 13, 18 (on petition). The Court

[5] In that case, the Second Circuit concluded that Section 3001(i) of RCRA exempted the ash remaining after incineration of municipal solid waste at a resource recovery facility from regulation as a hazardous waste. See *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 931 F.2d at 213.

entered the suggested order. *City of Chicago v. Environmental Defense Fund*, 113 S. Ct. 486 (1992) (granting, vacating, and remanding).

On remand, the same panel of the court of appeals again divided and reaffirmed its previous decision. The majority held that the EPA memorandum did not affect its opinion or judgment in this case. Pet. App. 2a. Judge Ripple again dissented, stating that the EPA's action deserved deferential review and that, accordingly, he would affirm the judgment of the district court. *Id.* at 3a-4a.

SUMMARY OF ARGUMENT

One of the objectives of RCRA is to promote resource recovery, 42 U.S.C. § 6902, because resource recovery facilities that burn municipal solid waste recover energy from solid waste and reduce the volume of solid waste disposed of in landfills. Congress determined that resource recovery would not be feasible if the facilities had to comply with the complex and costly regulations governing hazardous wastes. Congress therefore enacted Section 3001(i) of RCRA, *id.* § 6921(i), to exempt resource recovery facilities from those regulations.

The plain language of Section 3001(i) exempts the ash produced when a resource recovery facility treats municipal solid waste by incineration from regulation as a hazardous waste. That section provides, in pertinent part, that:

> [a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purpose of regulation under [Subtitle C] * * *.

42 U.S.C. § 6921(i). This language exempts all the waste management activities of a resource recovery facility from Subtitle C regulation, including the production and

subsequent disposal of the ash residue of incineration. The incineration of waste that produces the ash at a resource recovery facility falls squarely within the statutory definition of "treatment," see *id.* § 6903(34), while disposal of the ash at a landfill falls squarely within the definition of "disposal," *id.* § 6904(3). The storage of ash until it is sent to a landfill is plainly covered by the statutory definition of "storage." See *id.* § 6903(33). The phrase "otherwise managing" encompasses all other handling of the ash produced at a resource recovery facility, including the collection of ash and its transportation to a landfill. See *id.* § 6903(7). Thus the plain terms of Section 3001(i) provide that a resource recovery facility does not store, treat, manage, collect, transport or dispose of hazardous waste and, therefore, need not comply with Subtitle C regulations.

The court of appeals found it significant that Section 3000(i) does not exempt materials "generated" by a resource recovery facility from regulation as hazardous waste. Pet. App. 10a. But the absence of the term "generated" in Section 3001(i) does not mean the ash produced at an incinerator must be managed as a hazardous waste. Congress had no reason to include "generation" within the statute. Everything that a resource recovery facility does to the municipal waste it burns is covered by the words found in Section 3001(i). Adding the term "generation" would therefore have added mere surplusage to the statute. Surely the scope of the exemption found in Section 3001(i) should be determined by examining the breadth of the terms that Congress actually put there, rather than by speculating about why Congress did not add some other term to the statute.

In addition, exempting the ash is consistent with the design of RCRA as a whole and its objects and policy. In RCRA, Congress repeatedly recognized that resource recovery should be encouraged as an alternative to disposing of raw garbage in landfills. See 42 U.S.C. §§ 6901(b),

(c), (d); 6902; 6941(a)(2), (3). Exempting all waste management activities of resource recovery facilities from hazardous waste regulation, including management of the ash residue of treatment, was one of the major ways in which Congress chose to further its goal of encouraging resource recovery. If ash must be treated as hazardous waste, the cost of resource recovery will skyrocket, and the exemption will fail to achieve Congress's expressed goal of promoting resource recovery facilities. And if the ash is not exempt from regulation, the scope of Section 3001(i)'s exemption will become implausibly narrow. These facilities take in only non-hazardous waste, which they could dispose of free from Subtitle C regulations even without regard to the exemption provided in Section 3001(i). The only meaningful exemption Section 3001(i) provides is an exemption for the ash remaining after incineration. The court of appeals' construction of the statute thus renders Section 3001(i) a practical nullity; that section could not possibly achieve Congress's goal of promoting resource recovery facilities if construed so narrowly.

The legislative history of Section 3001(i) confirms that Congress intended to exempt ash from Subtitle C regulations. The Senate Report that accompanied the legislation demonstrates that Congress intended a broad exemption for all waste management activities of resource recovery facilities in order "to encourage commercially viable * * * facilities and to remove impediments that may hinder their development and operation." S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). Requiring ash to be regulated as a hazardous waste would vastly increase the costs of operating such a facility, and erect a substantial impediment to their operation and commercial viability. The legislative history also indicates that Congress intended to expand, not severely contract, the EPA's household waste exclusion, which unquestionably extends to the ash remaining after household waste has been treated by incineration.

Finally, if this Court should conclude that Section 3001(i) is ambiguous, it should defer to the EPA's interpretation of the statute, set forth in the Administrator's recent memorandum. See Pet. App. 41a-49a. That memorandum, which interprets Section 3001(i) to exempt the ash produced at a resource recovery facility from regulation as a hazardous waste, is entitled to deference; for it is rational, consistent with the statute, and informed by EPA's expert assessment of the need to promote resource recovery, and of the limited risk to the environment if ash is placed in Subtitle D landfills.

ARGUMENT

SECTION 3001(i) OF RCRA EXCLUDES THE ASH PRODUCED AT A RESOURCE RECOVERY FACILITY THAT BURNS HOUSEHOLD WASTE AND NON-HAZARDOUS COMMERCIAL WASTE FROM REGULATION AS A HAZARDOUS WASTE.

Congress had two objectives when enacting RCRA: "to promote the protection of health and the environment *and* to conserve valuable material and resources * * *." 42 U.S.C. § 6902 (emphasis added). One of the ways it chose to further these two goals simultaneously was to encourage and promote resource recovery, *ibid.*, because resource recovery facilities that incinerate solid waste both recover energy from solid waste and reduce the volume of solid waste that is disposed of in landfills. To encourage resource recovery, Congress exempted resource recovery facilities from the complex regulations governing hazardous waste by enacting Section 3001(i) of RCRA. 42 U.S.C. § 6921(i). The plain language of this section, its legislative history, and the EPA's interpretation of the statute all support the conclusion that the ash produced when a resource recovery facility treats waste by burning is exempt from regulation as a hazardous waste. Any other interpretation would frustrate Congress's clear purpose in enacting Section 3001(i).

A. The Plain Language Of Section 3001(i) Exempts The Ash Residue Produced At A Resource Recovery Facility From Regulation As A Hazardous Waste.

It is a fundamental principle of statutory interpretation that the inquiry must begin with the language of the statute itself and that the statute must be interpreted in accordance with its plain meaning. See, *e.g., United States v. Ron Pair Enterprises,* 489 U.S. 235, 241 (1989); *Watt v. Alaska,* 451 U.S. 259, 265 (1981). Section 3001(i) provides, in pertinent part, that

> [a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purpose of regulation under [Subtitle C] * * *.

42 U.S.C. § 6921(i). A resource recovery facility covered by Section 3001(i) takes in household waste and nonhazardous commercial waste. See 42 U.S.C. § 6921(i)(1). The waste is transported to the facility; it may be stored; it is treated by incineration, and the ash residue resulting from incineration is disposed of in a landfill. The plain language of Section 3001(i) exempts each of these waste management activities from regulations governing the management of hazardous waste. That section therefore exempts the production of ash and subsequent disposal of the ash produced when solid waste is incinerated at a resource recovery facility.

RCRA defines each of the terms used in Section 3001(i). "Treatment" is defined to mean "any method, technique or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume." 42 U.S.C. § 6903(34). Incineration of the waste taken in at a resource recovery facility falls squarely within the statutory definition of

treatment since it changes the physical and chemical character of the waste to reduce its volume.[6] "Storage" of hazardous waste "means the containment of hazardous waste either on a temporary basis or for a period of years, in such a manner as to to constitute disposal of such hazardous waste." 42 U.S.C. § 6903(33). "Disposal" in turn is defined as

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any other constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). This term plainly encompasses the disposal at a landfill of the ash residue of the treatment process at a resource recovery facility. "Management" of hazardous waste "means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes." 42 U.S.C. § 6903(7). The phrase "otherwise managing hazardous wastes" accordingly exempts the collection, storage, and transportation of the waste as well as the other activities that occur at a resource recovery facility.

Thus, the plain terms of Section 3001(i) provide an exemption from Subtitle C hazardous waste regulations for every step of the process—the incineration, collection, storage, transportation, disposal, or other managing of the ash produced at resource recovery facilities like the Northwest Facility. There is nothing these facilities do with ash that is not within the ambit of the statutorily defined terms found in Section 3001(i).

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[6] When solid waste is burned, its organic, or carbonic based elements, decompose. The remaining ash contains metals that are not combustible. These metals are, of course, the same metals that were contained in the solid waste received at the facility.

The Seventh Circuit focussed on the absence of the word "generated" in Section 3001(i) to conclude that the ash may be regulated as a hazardous waste. See Pet. App. 10a ("Section 3001(i) does not explicitly exempt the ash generated from the resource recovery facility"). The absence of that word is of no significance, for a number of reasons.

First, Congress did not need to add the term "generated" to Section 3001(i) to ensure that the ash produced at a municipal incinerator is exempt from regulation as hazardous waste because the language it did put into Section 3001(i) already made that clear. The plain meaning of the terms Congress used provide an exemption for everything the resource recovery facility does—from start to finish. Adding the term "generated" would have accomplished nothing, aside from cluttering the statute with surplusage. Questions of statutory construction should be decided by ascertaining the meaning of the words Congress has enacted into law, rather than by speculating about why it did not enact some other word as well, especially when the additional word could hardly change the meaning of the terms Congress actually employed. Cf. *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("We do not attach decisive significance to the unexplained disappearance of one word from an unenacted bill because 'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent." (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947)).

Second, the court of appeals' view that the "generation" of ash at a resource recovery facility is subject to regulation under Subtitle C of RCRA flies in the face of the language that Congress enacted in Section 3001(i). If the production of ash through incineration generates hazardous waste subject to regulation under Subtitle C, then, as the court of appeals held, the facility is required to store, transport, and dispose of the ash as hazardous

waste. But this is inconsistent with the plain language of Section 3001(i), which provides that these resource recovery facilities "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." 42 U.S.C. § 6921(i). The court of appeals unquestionably "deemed" the City to be storing, disposing of, and managing hazardous waste at the Northwest Facility—it held that incineration generates hazardous waste and directed the City to handle the ash as hazardous waste. The statute itself provides otherwise, and precludes a construction that "deems" the Northwest Facility to be storing, transporting, or disposing of hazardous waste subject to Subtitle C regulation.

Third, the court of appeals misunderstood the meaning of "generated" under RCRA when it questioned why Congress did not include that term in Section 3001(i). Congress had no need to include the term "generation" in that section because a resource recovery facility does not "generate" waste within the meaning of RCRA. Under the statute, material becomes a solid waste when it is discarded. See 42 U.S.C. § 6903(27). See also *American Mining Congress v. EPA*, 824 F.2d 1177, 1183, 1193 (D.C. Cir. 1987).[7] The solid waste that is managed and treated at a resource recovery facility is therefore "generated" when a household or business discards it before it is picked up and hauled to the resource recovery facility. When a resource recovery facility incinerates that solid waste, it accordingly is not "generating" waste. Instead, it is treating material that is already a solid waste. The ash, which is the residue of that treatment, then may be disposed of in a landfill, since Section 3001(i) in plain terms exempts treatment and disposal of waste from Subtitle C regulation.

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[7] Hazardous waste is a subset of solid waste. See 42 U.S.C. § 6903(5); *American Mining Congress*, 824 F.2d at 1179.

B. The Object And Purpose Of Section 3001(i) Supports Excluding The Ash Produced At A Resource Recovery Facility From Regulation As A Hazardous Waste.

In determining the meaning of a statute, this Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States,* 494 U.S. 152, 158 (1990). Accord, *e.g., Commissioner v. Engle,* 464 U.S. 206, 217 (1984); *Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103, 118-19 (1983). Here, the stated policy goals and objectives of RCRA reaffirm what the plain language of the statute indicates—that Congress intended to exempt all the waste management activities of resource recovery facilities, including management of the ash residue, from Subtitle C regulations. This conclusion is dictated by Congress's goal of encouraging the development of resource recovery facilities to address the solid waste crisis.

Congress has repeatedly recognized that resource recovery facilities are to be encouraged as an alternative to disposing of untreated garbage in landfills. RCRA contains Congress's findings:

> (1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;
>
> * * * *
>
> (8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

42 U.S.C. § 6901(b)(1), (8). Congress also found that

> (1) millions of tons of recoverable material which could be used are buried each year;
>
> * * * *
>
> (3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

42 U.S.C. § 6901(c)(1), (3); and that

> (2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and
>
> (3) technology exists to produce usable energy from solid waste.

42 U.S.C. § 6901(d)(2), (3).

When Congress amended Subtitle D of RCRA in 1980, it specifically found that

> (2) solid waste contains valuable energy and material resources which can be recovered and used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials;
>
> (3) the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste * * *.

42 U.S.C. § 6941a(2), (3).

RCRA's objectives are consistent with these findings. RCRA states that

> The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by—
>
> (1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resources recovery and resource conservation systems) which will promote improved solid waste management techniques * * *;
>
> * * * *

> (10) promoting the demonstration, construction and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water and land resources; and
>
> (11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

42 U.S.C. § 6902(1), (10), (11). Thus, one of the major goals of RCRA is to encourage the use of resource recovery facilities. Excluding all the waste management activities of resource recovery facilities from hazardous waste regulations was one of the ways that Congress chose to further that goal.[8] The Seventh Circuit's holding that the ash is not within the exemption frustrates Congress's goal of encouraging the development and operation of resource recovery facilities because it subjects them to the potentially enormous expense of managing ash residue as a hazardous waste.

In its September 1992 memorandum, EPA noted that the cost of Subtitle C disposal averages more than ten times the cost of Subtitle D disposal.

> The cost associated with the disposal of MWC [municipal waste combustion] ash in Subtitle C facilities are dramatically higher than in Subtitle D landfills. Although the costs vary significantly from region to region, when averaged on a national basis there is over a ten-fold difference between the cost of disposal of MWC ash in a Subtitle C facility compared to a Subtitle D facility: the cost of transporting and disposing of MWC ash in a Subtitle C facility is approximately $453.00 per ton; the cost of doing so in a Subtitle D landfill is approximately $42.00 per ton. For states that combust substantial portions of their solid waste (in resource recovery and other combustion facilities), such as Connecticut (65%), Massachusetts (47%), and Maine (45%), this cost differential could be enormous.

Pet. App. 48a-49a.[9]

Based on these figures, EPA concluded that "[f]or nonhazardous municipal solid waste that can be disposed of in either a Subtitle D landfill or combusted in a resource recovery facility, the comparative economic desirability of these two alternatives is significantly impacted by the application of Section 3001(i) to MWC ash." Pet. App. 48a (footnote omitted). This tenfold increase in cost will, as EPA concluded, likely create a "strong economic incentive * * * to dispose of raw municipal solid waste in Subtitle D landfills, rather than combust the waste in resource recovery facilities." *Ibid.* With resource recovery facilities laboring under such a huge cost disadvantage if they are subject to Subtitle C regulation, there could be no meaningful chance to achieve the statutory goal of promoting resource recovery. Congress could not have intended a result that made Section 3001(i) almost entirely ineffective in achieving its expressed objective. Congress plainly intended that resource recovery facilities incur lower costs of complying with federal waste regulation than do Subtitle C facilities. The result below,

[8] Section 3001(i) is one of a number of provisions that Congress has enacted to encourage the construction and use of resource recovery facilities. See, *e.g.*, 42 U.S.C. §§ 6943(a)(6), 6943(c)(1), 6948(d)(3).

[9] Based on these average figures, the increased costs for the City's Northwest Facility, which disposes of between 110,000 and 140,000 tons of ash annually (Pet. App. 6a), could amount to as much as $57 million each year, if all its ash had to be managed as a hazardous waste. This EPA cost estimate is consistent with other estimates of the cost differential between subtitle C and D landfills. Compare National Solid Waste Management Association, *1990 Landfill Tipping Fee Survey* at 7 (cost of disposing of a ton of waste at a Subtitle D landfill in the midwest averages $23.25), with ICF, Inc., *1990 Survey of Selected Firms in the Commercial Waste Management Industry: Draft Report* (Sept. 17, 1991) (conservative estimate of the cost of stabilizing and disposing of a ton of waste at a Subtitle C landfill is $210).

however, is utterly inconsistent with this express congressional objective.

Even aside from the economic implications of the decision below, the court of appeals' construction of Section 3001(i) is inconsistent with logic and common sense. If the exeption from hazardous waste regulations in Section 3001(i) does not extend to disposal of ash, the exemption would be rendered implausibly narrow. The ash residue of incineration is the only waste a resource recovery facility disposes of in large quantities, and it is the only potential hazardous waste such facilities collect, store, transport or dispose of. That is because Section 3001(i) by its own terms applies only to resource recovery facilities that accept household waste and non-hazardous commercial waste; it does not apply to a facility that accepts waste that Congress or EPA has identified as hazardous. See 42 U.S.C. § 6921(i)(1). EPA has long defined household waste as non-hazardous. See 40 C.F.R. § 261.4(b)(1) (1991). Thus when a resource recovery facility takes in waste, it is transporting, storing, and treating waste that is either non-hazardous in fact or deemed to be non-hazardous. Indeed, if such a facility directly landfilled rather than incinerated any of the waste taken in, it would not have to manage the waste as a hazardous waste, even without regard to the exemption contained in Section 3001(i).

For this reason, resource recovery facilities do not need, and gain no advantage from, Section 3001(i) before the waste is burned. If Section 3001(i) does not exempt the ash remaining after incineration of household and non-hazardous commercial wastes from Subtitle C regulation, it provides little, if any regulatory relief for resource recovery facilities because it fails to exempt the only part of the process that could conceivably even be covered by Subtitle C. See *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758, 763 n.12 (S.D.N.Y. 1989), aff'd 931 F.2d 211 (2d Cir.),

cert. denied, 112 S. Ct. 453 (1991) (if ash is not exempt from regulation as a hazardous waste "it is difficult to understand what, if any, benefit [resource recovery facilities] deriv[e] from the exemption"). Section 3001(i) makes sense only if it exempts the ash residue produced at resource recovery facilities from hazardous waste regulations.

Statutes should be construed in order to avoid unreasonable or absurd results that Congress could not have intended. See, *e.g.*, *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1566 n.12 (1993); *Rowland v. California Men's Colony*, 113 S. Ct. 716, 720 (1993). Even if the language of Section 3001(i) supported the Seventh Circuit's construction (which it does not, as we explain above), "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). Here, the Seventh Circuit's construction of Section 3001(i) could not more plainly defeat the purpose of the statute—it eliminates any meaningful cost advantage resource recovery facilities might have over waste disposal governed by Subtitle C, and exempts nothing these facilities actually do from the regulation to which they would otherwise be subject. Congress could not have intended Section 3001(i) to be such an empty gesture. Cf. *American Tobacco Co. v. Patterson*, 465 U.S. 63, 69-71 (1982) (Title VII's exemption for seniority systems should not be construed so narrowly as to deprive it of practical utility).

C. The Legislative History Of Section 3001(i) Supports Excluding The Ash Produced At A Resource Recovery Facility From Regulation As A Hazardous Waste.

The legislative history of Section 3001(i) confirms what the plain language of the statute demonstrates—that Congress intended to exempt the ash residue of in-

cineration at a resource recovery facility from regulation as a hazardous waste. A Report of the Senate Committee on Environment and Public Works, which accompanied the proposed legislation, leaves no doubt that Congress intended to promote resource recovery by exempting all waste management activities from hazardous waste regulation. The report states:

> The reported bill adds a subsection (d) [sic] to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the [EPA] in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.
>
> Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources other than "households," including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. *It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation.* New section 3001(d) [sic] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.
>
> *All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion,* if the limitations in paragraphs (1) and (2) of subsection (d) [sic] are met.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983) (emphasis added). This report demonstrates that Congress

intended to encourage the development and operation of resource recovery facilities by exempting them from Subtitle C regulation, and that the exemption was intended to cover all aspects of waste management at a resource recovery facility, including management of the ash produced at the facility. Disposing of ash pursuant to Subtitle C is a definite impediment to the operation of resource recovery facilities because of the severe impact the regulatory scheme would have on their commercial viability. See page 21, *supra*.

The Seventh Circuit majority refused to rely on this report; the court focussed on the word "generation" and concluded that it should not rely upon a single word in a committee report that did not appear in the statute. Pet. App. 12a. But it is not the word "generation" alone that indicates that ash is exempt from Subtitle C regulation; it is rather the entire context in which the word appears, as the three paragraphs from the report set out above make clear. Moreover, our reliance on the Senate Committee's Report does not involve the selective use of one piece of a legislative history containing many conflicting statements —this report is the sole reference to this issue in the legislative history, and the language and analysis in the report were ultimately adopted by the Conference Committee. See H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 79, 106 (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5649, 5677. Thus, this report carries special weight as the most authoritative analysis of the legislation that was before Congress. See, *e.g., Thornburg v. Gingles,* 478 U.S. 30, 43 n.7 (1986).

The Senate Report, also confirms that Congress intended Section 3001(i) to expand, not severely contract, the existing EPA household waste exclusion. RCRA, as enacted in 1976, did not include an explicit exclusion of household waste from hazardous waste regulation under Subtitle C. Instead, Congress required the EPA to develop and promulgate criteria for identifying hazardous

wastes, see 42 U.S.C. § 6921(a), but noted that hazardous waste regulation "is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 988, 94th Cong. 2d Sess. 16 (1976). Pursuant to this directive, EPA included in its first set of regulations implementing RCRA a provision known as the "Household Waste Exclusion," which provided, in pertinent part, that:

> (b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:
>
> > (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g. refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels).

45 Fed. Reg. 33120 (1980) (codified as amended at 40 C.F.R. § 261.4(b)(1) (1991)). Like the statute, the regulation did not specifically mention "generation." Despite that omission, EPA unequivocally stated in the preamble that the ash residue from incineration of household waste was excluded from hazardous waste regulation: "Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste." *Id.* at 33099.

When Congress amended RCRA in 1984, it enacted Section 3001(i)—as the provision's title states—to "[c]larif[y] * * * the household waste exclusion," 42 U.S.C. § 6921(i), as it applies to resource recovery facilities. Congress expanded the EPA's regulatory exclusion to apply to resource recovery facilities that burn non-hazardous waste from sources other than households. A

resource recovery facility within the exemption may take in "solid waste from commercial or industrial sources that does not contain hazardous waste," *ibid.*, in addition to household waste. Because EPA's household waste exclusion indisputedly covered ash, and Congress's clear objective was to expand the exclusion to include resource recovery facilities that take in non-hazardous commercial waste in addition to household waste, see S. Rep. No. 284, *supra*, at 61, the only conceivable conclusion is that the statutory exemption extends to ash as well. As the district court observed in the opinion adopted by the Second Circuit in the *Wheelabrator* case, "[n]owhere in the 1984 exclusion, nor in the Committee Report which accompanied it, is there any hint of a congressional intent to limit the scope of [the household waste] exclusion." 725 F. Supp. at 765. This Court has repeatedly held that when there is no evidence that Congress intended to repudiate an existing administrative interpretation of a statute when it legislates, Congress is presumed to have approved of that interpretation. See, *e.g.*, *North Haven Board of Education v. Bell*, 456 U.S. 512, 533-35 (1982); *Haig v. Agee*, 453 U.S. 280, 297-98 (1981); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *NLRB v. Bell Aerospace Co*, 416 U.S. 267, 275 (1974).

The Seventh Circuit based its contrary conclusion on the absence of the word "generates" from the list of activities exempt from Subtitle C regulation. Pet. App. 18a-19a. But that term was also absent from the 1980 EPA regulation establishing the household waste exclusion. See 45 Fed. Reg. 33120 (1980). As EPA explained in its preamble, "[s]ince household waste is excluded *in all phases of its management,*" ash resulting from incineration was excluded from Subtitle C regulation. *Id.* at 33099 (emphasis added). Because Congress's objective was to clarify the EPA regulation, it was entirely logical for Congress to use the language employed by the agency and exempt from regulation under Subtitle

C all "management" of the waste received at resource recovery facilities. This is just what Congress did by including in Section 3001(i) that such facilities would not be deemed to be "otherwise managing hazardous wastes for the purposes of regulation" under Subtitle C. 42 U.S.C. § 6921(i). Congress's failure to incorporate a term that did not appear in the EPA regulation is in no way evidence that Congress crafted a narrower exemption. Rather, Congress's decision to track closely the terminology used by the EPA bolsters the conclusion that Congress created an equivalent statutory exemption for resource recovery facilities taking in a range of wastes somewhat broader than those covered by the household waste exclusion.

The difference between Section 3001(i), as the Seventh Circuit interpreted it, and the EPA's household waste exclusion itself demonstrates the absurdity of that court's result. Although household waste may contain some hazardous material, the EPA's household waste exclusion, which EPA explicitly extended to the ash produced when household waste is burned, exempts from Subtitle C regulation the ash produced by an incinerator burning only household waste. If a resource recovery facility operating under Section 3001(i) burns non-hazardous commercial waste in addition to household waste, however, in the Seventh Circuit's view the facility must manage and dispose of its ash pursuant to Subtitle C. There is no reason to require such regulatory burdens simply because a facility accepts non-hazardous commercial waste; that facility does not require Subtitle C regulation any more than a facility that accepts only household waste. See *Wheelabrator*, 725 F. Supp. at 765. Thus, the Seventh Circuit has transformed a statute designed to provide an incentive for resource recovery by relieving facilities that burn household waste and non-hazardous commercial waste from regulatory burdens into one that subjects those facilities to greater regulation and increased costs. That is precisely the opposite of what Congress sought to achieve.

D. If The Language Of Section 3001(i) Is Ambiguous, This Court Should Defer To The EPA's Interpretation That The Ash Produced At A Resource Recovery Facility Is Exempt From Hazardous Waste Regulations.

Our reading of the statute is also consistent with the interpretation of the EPA, which is charged with administering the statute and whose views are therefore entitled to deference. In September 1992, the Administrator of the EPA issued a memorandum addressed to all regional administrators setting forth the Agency's decision that under Section 3001(i), the ash produced at a resource recovery facility is exempt from hazardous waste regulations. Pet. App. 41a. Although we believe that the language of Section 3001(i) and the design and purpose of RCRA as a whole plainly support exempting the ash from Subtitle C regulation, if this Court should find the statute ambiguous, it should defer to the EPA's interpretation. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

"Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law." *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). If Section 3001(i) is ambiguous, the reasons for deference to administrative interpretations are particularly applicable here. As the Court explained in *Chevron*, the principle of deference to administrative interpretations

> has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

467 U.S. at 844 (citations omitted). RCRA is a complex statute with more than one policy goal. Determining the

scope of Section 3001(i), in particular, involves balancing the benefits of promoting resource recovery facilities against the potential harm to the environment if the ash from such facilities is placed in Subtitle D landfills. EPA has exercised its expertise in environmental matters to reconcile these potentially conflicting goals found in the statute. See 42 U.S.C. § 6902. As the Administrator's detailed memorandum explains, human health and the environment will be fully protected if the ash is regulated under Subtitle D, and the development and operation of resource recovery facilities will be promoted by exempting the ash from Subtitle C regulation. Pet. App. 46a-49a. Here, as in *Chevron*, "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." 467 U.S. at 865 (citations omitted).

The question, then, is whether the EPA's interpretation of Section 3001(i) is permissible. See *Chevron*, 467 U.S. at 843. An agency's interpretation "need not be the best one by grammatical or any other standards. Rather, [its] interpretation of ambiguous language need only be reasonable to be entitled to deference." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. The agency's construction of the statute it administers is "permissible" if it "is a construction that is 'rational and consistent with the statute.'" *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987)). "If the agency interpretation is not in

conflict with the plain language of the statute, deference is due." *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. at 1401. Accordingly, this Court need find "only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its own judgment for that of EPA." *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). The EPA's memorandum easily meets the test.

First, EPA's construction of Section 3001(i) is rational. The Administrator has analyzed the issue on the basis of the text of the statute and its legislative history, and has considered how best to serve the policies of RCRA. It was eminently rational for EPA to conclude, in light of the enormous costs of disposing of ash pursuant to Subtitle C hazardous waste regulations, that requiring resource recovery facilities to manage and dispose of their ash as a hazardous waste would be a costly impediment that would hinder the development and operation of those facilities. See Pet. App. 47a-49a. EPA also rationally concluded that human health and the environment would be protected if ash were regulated under Subtitle D. This conclusion was based in part upon the new, more stringent criteria EPA had promulgated for municipal solid waste landfills. See Pet. App. 46a-46a. See also 56 Fed. Reg. 50978 (1991).[10] Moreover, EPA can take further action

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[10] The EPA's conclusion that disposal of municipal incinerator ash in Subtitle D landfills will protect human health and the environment is consistent with recent studies that show that ash from resource recovery facilities disposed of in a lined monofill (as is the ash in this case) is not hazardous. See Richard W. Goodwin, *Defending the Character of Ash*, Solid Waste & Power, Sept./Oct. 1992 at 18. Before the recent studies, ash had been tested in a laboratory based on the Extraction Procedure and Toxicity Characteristic Leaching Procedure lab tests. *Ibid.* Field tests of ash disposed of in monofills, however, show that the ash in a landfill behaves differently from ash in the laboratory. *Ibid.* The lime used in the scrubber systems of resource recovery incinerators gives the ash a concrete-like character that binds heavy metals, such as lead

to protect health and the environment if necessary. The Administrator noted that if it comes to EPA's attention that municipal waste combustion ash "is being managed or disposed of in a manner that is not protective of human health and the environment under Subtitle D, the Agency will consider additional actions, including providing technical assistance, issuing guidance documents, and, if approprate, promulgating additional regulations to address those situations." Pet. App. 47a.

Second, EPA's construction of the statute is entirely consistent with the statute, as we explain above in Parts I.A. and I.B., since RCRA was plainly intended to encourage the development and operation of resource recovery facilities in order to reduce the volume of solid waste disposed of in landfills and to recover energy from solid waste.

The Seventh Circuit majority refused to defer to the interpretation of Section 3001(i) in the EPA memorandum because the EPA's position had not been consistent. See Pet. App. 2a. The 1992 memorandum, however, set forth EPA's first firm position on the issue of how ash from a resource recovery facility should be regulated. EPA's only prior pronouncement on Section 3001(i), contained in the preamble to its 1985 regulations, was far from a model of clarity—it simultaneously expressed EPA's view that Section 3001(i) did not extend to ash, and its decision not to act on that view. The preamble stated that "EPA does not see in [Section 3001(i)] an intent to exempt the regulation of incinerator ash from the burning of non-hazardous waste in resource recovery

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and cadmium, into the ash, so that they are not released into the leachate or the environment. *Id.* at 19-20. Test results show that actual leachate values from ash monofills approximate United States EPA Primary Drinking Water Standards. *Id.* at 20. Moreover, data from one four year study of ash showed that heavy metal concentrations in leachate did not increase, but in fact diminished over time. *Ibid.*

facilities if the ash routinely exhibits a characteristic of hazardous waste." 50 Fed. Reg. 28726 (1985). The preamble, however, went on to state that:

> EPA does not believe the [Hazardous and Solid Waste Amendments of 1984] impose new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities. Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of important technical and policy issues that would be posed in the event serious questions arose about the residue.

Ibid. Since municipal waste incinerator ash had not been treated as a hazardous waste under the EPA household waste exclusion, this statement indicated that EPA did not intend to regulate the ash as a hazardous waste.[11] Indeed, EPA has never cited the City for any violation of federal hazardous waste regulations in connection with the Northwest Facility or the handling of the ash at the Northwest Facility. R. 18, ¶ 20. The 1992 EPA memorandum concludes unambiguously that the ash is not subject to regulation as a hazardous waste. It represents EPA's final position on this issue, after what has plainly been a lengthy and careful deliberative process.

Moreover, this Court has rejected the Seventh Circuit's conclusion that an agency's changed position is not entitled to deference. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990). In *Chevron* itself, this Court explained that "[a]n initial agency interpretation is not

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[11] The ambiguity and problematic character of the preamble is highlighted by the subsequent congressional testimony (which the court of appeals noted, see Pet. App. 14a-16a) of two EPA officials, who disagreed in significant respects with the preamble and concluded that EPA needed to revisit the issue. In 1992, EPA did just that.

instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron,* 467 U.S. at 863-64. In *Chevron,* EPA had changed its definition of a "stationary source" within the meaning of the Clean Air Act, and the revised interpretation was given full deference. *Ibid.* Particularly in the field of environmental law, where an agency must make difficult judgments about how to balance competing policies, the passage of time may provide an agency with experience and data that warrant revisiting prior decisions.

In addition, an agency's changed interpretation is entitled to "substantial deference * * * if there appears to have been good reason for the change." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 355-56 (1989). If an agency's change in position is supported by "reasoned analysis," it will receive judicial deference. *Rust v. Sullivan,* 111 S. Ct. at 1769 (quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 42 (1983)). Here, if EPA's position has changed, that change can be attributed in part to EPA's promulgation of stricter criteria for municipal solid waste landfills, as EPA itself acknowledges. See Pet. App. 46a-47a (referring to new rules for Subtitle D landfills found at 40 C.F.R. part 258 and 56 Fed. Reg. 50978 (1991)). These more stringent requirements led EPA to conclude that the ash produced at a resource recovery facility can be safely regulated under Subtitle D. See Pet. App. 46a-47a. This development, which caused EPA to reassess the environmental risks posed if ash is stored in Subtitle D landfills, surely is sufficient reason for a change in its position.

Therefore, if this Court should find that Section 3001(i) is ambiguous, it should defer to EPA's reasonable interpretation of that section to exempt the ash produced at a resource recovery facility from hazardous waste regulations under Subtitle C of RCRA.

CONCLUSION

For all the above reasons, the judgment below should be reversed.

Respectfully submitted,

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